

Carrier Liability for Passengers

Introduction

The recent Mangalore crash of an Air India flight from Dubai brought to the forefront the yet untested liability of the air carriers and the compensation due to passengers under the Montreal Convention of 1999 (“**Montreal Convention**”) which was ratified by India only last year.¹ Until recently, India was a signatory to the antiquated Warsaw Convention of 1929 (“**Warsaw Convention**”) as amended by the Hague Protocol of 1955 (“**Hague Protocol**”) which secured significantly low limits of liability on the carrier in case of death or injury to the passengers or upon delay, lost or damaged baggage. By virtue of the Carriage by Air (Amendment) Act, 2009 revising the Carriage by Air Act, 1972 (the “**Act**”), India has ratified the Montreal Convention securing higher levels of compensation and obviating discrimination for Indian passengers.

This bulletin provides a glimpse into the prior and current international carrier liability in case of passenger death and bodily injury.

1.0 Status prior to accession of Montreal Convention

1.1 Liability

The Warsaw Convention and Hague Protocol regime provided a maximum liability of air carriers for bodily injury or death of passengers of 250,000 francs² (*approximately \$46,666*³). This was not only a significantly low compensation but the regime also did not make provision for any advance payment by the carrier leaving claimants to go against the carriers to seek compensation. This is evident from the October 2009 ruling⁴ in respect of a crash of a domestic flight of Indian Airlines in 1988 wherein the Gujarat High Court determined an amount of Rs. 7.53 lakhs (*approximately \$16,700*) as compensation based on the income of the victim in 1988 *viz.*, Rs. 1 lakhs (*approximately \$2,200*), likely residual life, potential expenses during residual life etc. and awarded a 9% interest from the date of filing the appeal. The other interesting aspect of the judgment is the heavy reliance on verdicts of motor vehicle claims.

1.2 Jurisdiction

The victim or their families were entitled to take action against foreign carriers in the territory of one of the signatories of the Warsaw Convention which could be either where –

¹ w.e.f. June 30, 2009

² Rule 22(5) of Schedule II of the Act provides that “The sums mentioned in francs in this rule shall be deemed to refer to a currency unit consisting of sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment”.

³ \$1 = Rs. 45

⁴ *Airport Authority of India v. Ushaben Shirishbbhai Shah & 6 Ors.* (2010) 1GLR 321

(i) the carrier maintains its principal residence, (ii) the carrier has its primary location of business, (iii) the contract is made, or (iv) the flight intended to have its final destination. The Warsaw Convention effectively left it to the claimants, who were not residents of the above states, to pursue a claim against such carriers in a jurisdiction other than their own which was not always feasible for claimants.

2.0 Status subsequent to accession of Convention

The Montreal Convention, formally the Convention for the Unification of Certain Rules for International Carriage, is a treaty adopted in 1999 and amended provisions of the Warsaw Convention and Hague Protocol concerning compensation for the victims of air disasters. It unified the rules on international carriage by air and modernized limitation of liability for international air transport.

2.1 Two-Tier Liability

It introduced a two-tier liability system: (i) a first tier of strict liability for damages of up to 100,000 SDR⁵ (approximately \$155,000) and; (ii) a second tier of liability based on the presumed fault of the carrier in which case there is unlimited liability.

It is pertinent to note that while the Montreal Convention provides for a first-tier 100,000 SDR as a strict liability, this amount does not reflect the minimum liability of the carrier. In other words, the Convention has left the determination of the level of damage to the local law. As such, if the courts in India rule that the damage sustained by each victim in the Air India crash is up to 100,000 SDR, the carrier cannot escape liability on the ground that it is not responsible for the accident.

Furthermore, the compensation package in respect of the second tier of liability is assessed in accordance with the provisions of the Act which incorporates the Montreal Convention. Globally, under this Convention, the amount of compensation is worked out in each case separately on “proof of loss basis” and determined and dependant upon the parameters of loss suffered by each passenger or claimant namely, the age of the deceased, educational status, employment with salary, earning capacity, dependants, general economic status etc. In the event, the claimants challenge such compensation amount, and where damages of more than 100,000 SDR are sought, the airline would have the burden of proof that the incident was not on account of its negligence and may thereby avoid liability by proving that the accident which caused the injury or death was attributable to the negligence of a third party.

2.2 Jurisdictional Flexibility

In addition to the options provided under the Warsaw Convention and Hague Protocol, the Montreal Convention added a “fifth” jurisdiction namely the principal and permanent residence of the passenger provided the carrier operates in such jurisdiction and such territory is a signatory to the Convention. This would ensure that Indian residents can

⁵ Special Drawing Rights as defined by IMF and 1 SDR = \$1.5

claim in the Indian courts against any airline as long as such journey is ratified by the Convention. Given that the determination of damages under the Convention is a matter of the local law, the jurisdiction where a claimant brings an action becomes significant as the assessment of damages may vary from one jurisdiction to another.

3.0 Impact on compensation in the recent Mangalore crash

In the recent crash, since the carrier NACIL was operating an international carriage from Dubai to Mangalore, the provisions of Montreal Convention were triggered and NACIL had to pay the compensation based on the two-tier system with strict liability at the outset. The claimants could potentially bring action in the UAE courts (*depending upon where the contract is made*), or India (*principal place of business of carrier*) or any third state provided permanent residence of such claimant is a party to the Convention.

We note⁶ that the insurers of NACIL have offered a flat interim compensation to the next of kin of the 128 deceased passengers viz., Rs. 10 lakhs (*approximately \$22,000*) to each adult deceased passenger; Rs. 5 lakhs (*approximately \$11,000*) to each passenger below the age of 12; with Rs. 2 lakhs (*approximately \$4,400*) disbursed to each injured passenger.

Given the low compensation, it is likely that the next of kin of some of the deceased passengers and the injured passengers would seek a higher final compensation which would be at least close to 100,000 SDR or \$155,000. It appears that NACIL is attempting to determine any further compensation on the basis of “proof of loss” implying that a child and an adult placed low in the economic strata would qualify for less compensation than an adult who is healthy and was from a good economic status⁷, since such amount would be much lesser than 100,000 SDR and this would reduce NACIL’s liability. Assuming the claimants file the claim in India, it will be interesting to see whether the courts assess the strict liability on the basis of the “proof of loss” basis or be more liberal in granting compensation. The final compensation determined would set the base line for compensation in future liability cases.

Conclusion

No doubt, the Montreal Convention has been a long-awaited change providing airlines and the passengers a more reliable regulation as opposed to the Warsaw regime which provided extremely low limits of compensation. Furthermore, with a large number of countries where Indian carriers have services, being signatories to the Montreal Convention, the accession has brought reasonable parity in the compensation available to Indian passengers. However, since liability under Montreal Convention would vary largely depending upon the jurisdiction where the claim is made, it is yet to be seen whether the

⁶ Statement by Mr. Praful Patel, Minister of State for Civil Aviation in the Upper House of the Parliament (Rajya Sabha) as released by Press Information Bureau on August 3, 2010 <http://pib.nic.in/release/release.asp?relid=64012>

⁷ Smitha Nair, Mangalore crash: Victims’ income to decide payout (September 17, 2010), <http://ibnlive.in.com/news/mangalore-crash-victims-income-to-decide-payout/131202-3.html>, and retrieved on September 23, 2010

Convention also facilitates swift recovery of proven damages without the need for lengthy litigation by the method of strict-liability for Indian residents.

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